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Supreme Court, U.S.
FILED
APR 2 - 2004
OFFICE OF THE CLERK

No. 03-1257

In The
Supreme Court of the United States

MARK BOIVIN,

Petitioner,

v.

TOWN OF ADDISON,

Respondent.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The petitioner claims that the Town of Addison's tax assessment of his property was unfairly inflated by "sales chasing" and other assessment errors, and that the state courts rejected his testimony as to value merely because he was not a licensed tax assessor, all in violation of his rights under the Fifth and Fourteenth Amendments.

1. Did the Vermont Supreme Court reject petitioner's claim of unconstitutional "sales chasing" on the basis of an adequate and independent state procedural ground?

2. Did the petitioner fail to present his other claims of unconstitutionally discriminatory over-taxation in the state courts?

3. Does the factual record fail to support any of petitioner's claims of unconstitutional discrimination?

4. Was the petitioner's claim that the trial court rejected his testimony on the basis of an unconstitutional pre-qualifying test of credibility either presented to the state courts or established as a matter of fact?

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JURISDICTION

The unpublished opinion of the Vermont Supreme Court (Pet. App. A) was handed down on December 4, 2003. The petition for a writ of certiorari was filed March 1, 2004, within ninety days. The petitioner subsequently filed a document entitled Brief in Support of Petition for Writ of Certiorari, dated March 25, 2004. This later filing is expressly prohibited by this Court's Rule 14.2 ("No separate brief in support of a petition for a writ of certiorari may be filed") and respondent asks that it not be filed, circulated nor considered.

Because the federal questions urged by petitioner were neither presented to the state courts nor passed on by them, this Court lacks jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

32 Vt. Stat. Ann. § 4467: Determination of Appeal

> Upon appeal to the director or the court, the appraiser or court shall proceed de novo and determine the correct valuation of the property as promptly as practicable and to determine a homestead value if a homestead has been declared with respect to the property for the year in which the appeal is taken. The appraiser or court shall take into account the requirements of law as to valuation, and the provisions of Chapter I, Article 9 of the Constitution of Vermont and the 14th Amendment to the Constitution of the United States. If the appraiser or court finds that the listed value of the property subject to appeal

does not correspond to the listed value of comparable properties within the town, the appraiser or court shall set said property in the list at a corresponding value. The findings and determinations of the appraiser shall be made in writing and shall be available to the appellant. If the appeal is taken to the director, the appraiser shall inspect the property prior to making a determination.

28 U.S.C. § 1257(a): State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

* * *

STATEMENT OF THE CASE

This is a tax dispute, focusing on the assessment of three parcels of farm property located in the Town of Addison, Vermont ("the Town"), a rural community with a population of about 1,400. In lieu of a comprehensive statement of the case, respondent adopts and incorporates by reference the Addison Superior Court's extensive Findings of Fact, Pet. App. B, pp. 41-49, and the Vermont

Supreme Court's summary of the facts and prior proceedings, Pet. App. A., pp.31-33. *See* R. Stern & E. Gressman, *Supreme Court Practice* 390 (6th ed. 1986).

The petition, in its Statement of the Case and elsewhere, omits critical procedural facts and misstates the case in a number of respects.

1.

The petition omits any indication of when or how the federal questions sought to be raised were presented to the state courts, and how the state courts passed on them, as required by Rule 14.1(g)(i), beyond an assertion that his argument to the Vermont Supreme Court "cit[ed] . . . numerous violations of equal protection and due process." Pet. 15.

The petitioner's Fourteenth Amendment equal protection claims, and his claim that the Town's assessment operated to take his property without just compensation in violation of the Fifth Amendment, cite three perceived defects in the assessment process: an assertion that the valuation of his property was unconstitutionally inflated by "sales chasing"; a claim that the Town's assessor violated equal protection by not subtracting the value of personal property involved in recent real estate sales used for comparison purposes; and an argument that the failure to evaluate the subject property according to its projected profitability – its current use value – also contributed to an unconstitutional discrimination and constituted a "taking" without just compensation in violation of the Fifth Amendment. *See* the first of petitioner's two Questions Presented, Pet. I, and the first section of his Argument, Pet. 17-22. None of these claims was presented to

the trial court. With the exception of the sales-chasing claim, none was presented to the Vermont Supreme Court.

Sales Chasing. The term "sales chasing" refers to the practice of reassessing real property to reflect recent sale prices of comparable property, without simultaneously reassessing all other property of the same class. Petitioner presented this aspect of his discrimination claim, at least implicitly, to the Vermont Supreme Court, in an extended quotation from that court's opinion in *Bookstaver v. Town of Windsor*, 131 Vt. 133 (1973). Pet. App. C, at pp. 90-92. But the Vermont Court held that the claim had been waived and declined to pass on it:

> Aside from Boivin's comment at trial that he believed Addison was engaged in "sales chasing," the issue was neither the subject of evidence nor argument before the trial court. Thus, we agree with Addison that the issue was not preserved for appeal, and we decline to address it.

Pet. App. A., pp. 37-38. Respondent argues below that the decision as to sales chasing rests on an adequate and independent state procedural ground.

Inclusion of Personal Property. In his brief to the Vermont Supreme Court petitioner complained that the Town's assessor had included personal property in his valuation of comparable farm property which had recently been sold, arguing that this practice violated a state statute; provisions of the Vermont Listers Handbook, the Vermont Supreme Court's decision in *Knollwood v. Town of Rutland*, 166 Vt. 529 (1997) (regarding the statutory duty to determine fair market value) and the Uniform Standards of Professional Appraisal Practice. Pet. App. C, pp.67-72. At no point did he argue that the practice, either

by itself or in combination with other perceived flaws in the Town's assessment, violated any federal right, or discriminated against him, or against any particular class of property-owners.

Current Use Valuation. The same is true of petitioner's claim that the Town violated his federal rights by not assessing his property according to its current use value. Vermont farm and forest property may be assessed by two different methods. Under the Current Use Program, 32 V.S.A. ch. 124 property which meets certain criteria is taxed according to its profitability, defined as "the price per acre which the land would command if it were required to remain henceforth in agriculture or forest use. . . ." Farms not enrolled in the program are taxed, like other real estate, according to assessed market value. The Current Use Program is fully voluntary and qualified owners may opt in or not. Once enrolled in the program, however, removal of the property incurs a penalty of 20% of the market value. 32 V.S.A. § 3751.

REASONS FOR DENYING CERTIORARI

I.

Petitioner's Constitutional Claims Were Procedurally Defaulted in the State Courts

The Claims of Discriminatory Tax Assessment

Two of petitioner's claims regarding the assessment of his property – the alleged failure to subtract the value of personal property from the sale prices of comparable property, and the failure to assess his property according to its "current use" value – were never argued to the state

courts as federal constitutional violations. As such, they are not proper subjects for certiorari, and the Court lacks jurisdiction under 28 U.S.C. § 1257(a) to consider them. As the Court wrote in *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969),

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391.
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> * * *
>
> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v.*

> *Ohio*, 385 U.S. 92 (1966), they should be given the first opportunity to consider them.

The Court's later opinions do not deviate one iota from this position. *See Illinois v. Gates*, 459 U.S. 1028, 1030 (1982); *Webb v. Webb*, 451 U.S. 493, 498-502 (1981). *Compare Baldwin v. Reese*, No. 02-964 (March 2, 2004); *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam); and *Picard v. Connor*, 404 U.S. 270, 275 (1971), affirming and applying a similar "fair presentation" requirement in habeas corpus petitions by state prisoners.

In *Baldwin* the Court recently held that a habeas petitioner had not "fairly presented" a federal question to the state appellate court when he alleged in his petition that he had been denied effective assistance of appellate counsel in the state courts, but failed to assert a violation of federal law. This case is *a fortiori* from *Baldwin*. With the exception of his sales-chasing argument, discussed below, petitioner's brief to the Vermont Supreme Court cited no federal law and claimed no federal constitutional violation. The Court in *Baldwin* held that it would not require state appellate courts to search the lower court record for unbriefed federal claims, and there is no more reason to do so in the context of a certiorari proceeding than in a habeas proceeding. In any case, a search of the lower court record would also have come up empty, because petitioner's federal constitutional claims were also not presented to, nor passed on by, the trial court.

The petitioner did present his "sales chasing" argument to the Vermont Supreme Court, but he had not done so in the trial court, and the Vermont Supreme Court refused to pass on it for that reason. Pet. App. A, pp. 38-39. The decision plainly rests on an adequate and independent

state procedural ground, and as such the Court lacks jurisdiction to review it.

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 80 L. Ed. 158, 56 S. Ct. 183 (1935); *Klinger v. Missouri*, 80 U.S. 257, 13 Wall. 257, 263, 20 L. Ed. 635 (1872). This rule applies whether the state law ground is substantive or procedural. *See, e.g., Fox Film, supra*; *Herndon v. Georgia*, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794 (1935). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126, 89 L. Ed. 789, 65 S. Ct. 459 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

Coleman v. Thompson, 501 U.S. 722, 729 (1991). Vermont's requirement that claims raised on appeal must first have been presented to the trial court is a long-standing, consistently applied fixture of state law, and petitioner makes no claim that it operated unfairly or capriciously in his case. *Compare Lee v. Kemna*, 534 U.S. 362 (2002).

The claim of witness "licensure"

Like his argument regarding the inclusion of personal property in the evaluation of recently-sold property, and his claim that his property should have been assessed by methods reserved for farms in the Current Use Program, petitioner's claim that the court rejected his testimony in violation of his First, Fifth and Fourteenth Amendment rights, Pet. 22, is made for the first time in his petition to this Court. Putting aside the complete lack of record support for his premise (see below), review should be denied for the reasons stated in *Cardinale v. Louisiana*, 394 U.S. at 438-439 and the recent decision in *Baldwin v. Reese*, declining review of federal claims which have not been presented to the state courts.

II.

None of Petitioner's Claims is Supported by the Factual Record

The trial judge's opinion recites the factual dispute between petitioner and Mr. DeVries, the Town's assessor, clearly and in considerable detail. Pet. App. B. pp. 41-49. Her decision to credit Mr. DeVries on most of the disputed points is similarly fully explained and fairly based, not on any presumptive test of licensure or accreditation, but on her visit to the Boivins' farm and the two days of testimony which she heard. *Id.* 51-52. Mr. Boivin "did not use accepted appraisal methods. He mixed listed values with sales values, and made adjustments to sales prices based upon theories the court does not accept." *Id.* 51. The judge also did "not accept Mr. Boivin's choice of comparable properties," which she thought were not fairly comparable, and she accordingly "reject[ed] Mr. Boivin's calculations" of

fair market value. Considering all the evidence she concluded that "the Town's assessed values have not been undercut by the plaintiff." *Id.* 51. Regarding the proper "equalization ratio" she disagreed with petitioner in part because of his recalculations of value based on his estimate of personal property involved in other sales, and also because he used a time period which was different from the state tax department's period. As authorized by state law she chose to "apply the ratio applicable across the board to all properties in the town" because the ratio applicable to farm and woodland properties had been calculated on the basis of only two sales, which she deemed "statistically invalid." The ratio she chose was in fact more favorable to petitioner than the one he proposed. *Id.* 53-54.

The Vermont Supreme Court approved all these findings as fairly supported by the evidence, and as such they are not subject to review by this Court. In the absence of extraordinary circumstances, none of which is presented by the case, "the decision of the state court upon a question of fact cannot be made the subject of inquiry here." *Grayson v. Harris*, 267 U.S. 352, 358 (1925). *Accord: Evco v. Jones*, 409 U.S. 91, 94 (1972); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952).

In addition to being procedurally defaulted, petitioner's constitutional objections to the state courts' valuation of his property, and their treatment of his testimony, are unsupported by the factual record.

CONCLUSION

For the above-stated reasons the petition for a writ of certiorari should be denied.

Dated: April 2, 2004

Respectfully submitted,

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